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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ADOLFO RAMIREZ, Defendant and Appellant.	E048274 (Super.Ct.Nos. RIF142040, RIF142399) **OPINION**

APPEAL from the Superior Court of Riverside County. David B. Downing, Judge. Affirmed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Gary W. Schons, Assistant Attorney General, and Gil Gonzalez and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

In two separate incidents, about two weeks apart, defendant Adolfo Ramirez ran from police officers who were trying to detain him; he also fought with them. "I always run. I was stupid," he explained. Each time, he was found to be in possession of a

methamphetamine pipe. The second time, he was also found to be in possession of methamphetamine.

A jury found defendant guilty on three counts of resisting an executive officer (Pen. Code, § 69), one count of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), two counts of possession of paraphernalia (Health & Saf. Code, § 11364), one count of striking a police dog (Pen. Code, § 600, subd. (a)), and one count of resisting a peace officer (Pen. Code, § 148, subd. (a)(1)). In connection with the methamphetamine possession charge, an on-bail enhancement was found true. (Pen. Code, § 12022.1.) Defendant admitted four 1-year prior prison term allegations. (Pen. Code, § 667.5, subd. (b).) As a result, defendant was sentenced to a total of 10 years in prison.

Defendant now contends:

1. The trial court erred by failing to give a unanimity instruction with respect to resisting an executive officer.

2. There was insufficient evidence to support defendant's conviction for striking a police dog.

3. The jury instruction on striking a police dog erroneously omitted the element of lack of legal justification.

We find no error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *February 21, 2008: Resisting an Executive Officer (Counts 1, 2, and 3), Striking a Police Dog (Count 6), and Possession of Paraphernalia (Count 7).*

On February 21, 2008, Riverside Police Officer Ryan Wilson was on patrol when he spotted a car with mismatched front and rear license plates. A woman was driving; defendant was the passenger.

Officer Wilson made a U-turn and started following the car. At first, it accelerated, but then it pulled over and stopped. He saw defendant throw a glass pipe out the window. The pipe was recovered and found to have apparent methamphetamine residue.

Officer Wilson ordered defendant to get out of the car, turn around, and put his hands behind his back. Initially, defendant complied. However, as Officer Wilson started to handcuff him, defendant pulled away and tried to elbow him in the face. There was a struggle; Officer Wilson punched defendant in the face and head, while defendant kept trying to elbow him.

Defendant then broke free and ran. Officer Wilson chased him and saw him enter the back yard of a house at 4173 Ottawa Avenue.

Backup officers arrived and established a perimeter. They included Sergeant Patrick McCarthy and Officer David Taylor, who brought his police dog, named Vaughn.

They searched 4173 Ottawa. Officer Taylor, with the help of the dog, found defendant hiding in the attic. The dog bit defendant's head. Defendant shook it off, but it bit defendant's hand. Defendant grabbed the dog's collar and started "pounding" its head against a beam in the attic.

Officer Taylor yelled, "Stop fighting the dog." He grabbed defendant's other hand, but defendant shoved him face first into a beam. A struggle ensued in which defendant kicked him in the chest and punched him several times. During the struggle, Officer Taylor and the dog both fell part way through a hole in the floor, but Officer Taylor managed to pull himself and the dog back out. The dog then bit defendant in the back of the head and pulled him down to the attic floor.

As defendant was struggling with the dog, Officer Wilson arrived. He saw defendant holding the dog's neck or muzzle with both hands. He ordered defendant to release the dog; when defendant did not comply, he hit him. Defendant let go.

Sergeant McCarthy then arrived. Defendant lunged toward him and made contact with him. They both fell. Sergeant McCarthy grabbed defendant in a bear hug just as the attic floor gave way under them. Sergeant McCarthy was able to hold himself up; officers on the floor below dragged defendant all the way down and detained him.

Officer Taylor sustained a scrape on his cheek, bruises on his rib cage, and a scrape on his shin. Sergeant McCarthy sustained "minor scrapes" on his legs. The dog sustained a cut to the left ear.

B. *March 9, 2008: Possession of Methamphetamine (Count 5), Possession of Paraphernalia (Count 8), and Resisting a Peace Officer (Count 9).*

On March 9, 2008, Riverside Police Officers Marco Ortiz and Henry Park were on patrol when they passed a parked pickup truck with expired registration tags. Defendant was in driver's seat; a woman was in the passenger seat.

Officer Ortiz made a U-turn and turned on his red light. Meanwhile, defendant got out of the pickup. Just as Officer Ortiz was getting out of his car, defendant started to run. Both officers chased and finally caught him. Officer Ortiz then searched him and found 0.12 grams of methamphetamine in his pocket. Officer Ortiz also searched the pickup. Under the center console, he found another 1.05 grams of methamphetamine; to the left of the driver's seat, he found a glass pipe with apparent methamphetamine residue. Defendant was on bail at the time.

II

FAILURE TO GIVE A UNANIMITY INSTRUCTION

WITH RESPECT TO RESISTING AN EXECUTIVE OFFICER

Defendant contends that the trial court erred by failing to give a unanimity instruction (e.g., Judicial Council of California Criminal Jury Instructions (CALCRIM) No. 3500) in connection with the three counts of resisting an executive officer.

"In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must

require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) "On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*Ibid.*)

The crime of resisting an executive officer requires either a threat (which was not shown here) or force or violence. (Pen. Code, § 69.) Defendant argues that the evidence showed that he committed multiple acts of force or violence against each officer. For example, count 1 charged defendant with resisting Officer Taylor. Officer Taylor testified that defendant shoved him face first into a beam, kicked him in the chest, and threw punches at him "a couple [of] times . . . ." These "hits" were the "most significant," but there may have been others.

Count 2 charged defendant with resisting Officer Wilson. Officer Wilson testified that defendant tried to elbow him in the face. A struggle ensued during which defendant kept trying to elbow him.

Finally, count 3 charged defendant with resisting Sergeant McCarthy. It appears that defendant made physical contact with Sergeant McCarthy only once, although the three officers described the contact in somewhat different terms. According to Sergeant McCarthy himself, defendant "got up," came toward him, and "pushed into" him. Officer Wilson testified that defendant was trying to run past Officer Taylor and the dog when he "rushed straight into" or "crashed into" Sergeant McCarthy. Officer Taylor testified

similarly that defendant was trying to get past him and the dog when he "jumped onto Sergeant McCarthy[.]" They all agreed, however, that, just at that moment, Sergeant McCarthy grabbed defendant, and the floor under them gave way.

As to each officer, this evidence showed only one discrete crime — a single struggle during which defendant continuously resisted. This case is analogous to *People* v. *Oppenheimer* (1909) 156 Cal. 733, in which the defendant was charged with assault with a deadly weapon. The evidence showed that first, he struck the victim with a window weight; then, he grabbed a knife and cut the victim with it. (*Id*. at pp. 736-737.) The Supreme Court held: "The evidence . . . in this case tended to show one continuous transaction, one assault in which two weapons were used." (*Id*. at p. 740.) It explained: "The mere fact that two weapons are used does not necessarily show two assaults. If one unlawfully assails another with his two hands, first striking at him with one hand and immediately thereafter with the other, no one would say that there were two offenses." (*Ibid*.) Here, too, there was one continuous assault. Defendant could not have been convicted of *two* counts of resisting each officer. Accordingly, a unanimity instruction was not required.

Separately and alternatively, the error, if any, was harmless. "'Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any

of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]' [Citation.]" (*People v. Curry* (2007) 158 Cal.App.4th 766, 783.) Here, no reasonable juror could have concluded that defendant shoved Officer Taylor but did not kick him (or vice versa). The same reasoning applies with respect to Officer Wilson. With respect to Sergeant McCarthy, the evidence showed only one contact.

We therefore conclude that the failure to give a unanimity instruction was not prejudicial error.

III

THE SUFFICIENCY OF THE EVIDENCE OF STRIKING A POLICE DOG

Defendant contends that there was insufficient evidence to support his conviction for striking a police dog in violation of Penal Code section 600, subdivision (a).

"'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "'We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. [Citation.]' [Citation.]" (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

Penal Code section 600, subdivision (a), as relevant here, provides: "Any person who willfully and maliciously and with no legal justification strikes, beats, kicks, cuts, stabs, [or] shoots with a firearm . . . any dog under the supervision of[] any peace officer in the discharge or attempted discharge of his or her duties[] is guilty of a public offense."

Defendant claims that none his contacts with the dog were harmful or injurious. For example, when the dog bit him, he merely shook it off; he also grabbed its collar, but supposedly only "to keep [it] at bay . . . ." Although the dog did suffer a cut ear, defendant reasons that that must have happened when it fell through the floor.

This overlooks Officer Taylor's testimony that, after grabbing the dog's collar, defendant started "pounding" its head against a beam, "I think to injure the dog to let him go." Officer Taylor also testified that, at one point, defendant was "kicking the dog back, trying to push the dog back the other way from him." This was sufficient evidence that defendant struck and/or kicked the dog.

Defendant also argues that, once the dog indicated that it had found him, by alerting, "the dog was no longer necessary." The statute, however, does not require that the dog be "necessary"; it merely requires that the dog be under the supervision of a peace officer who is discharging his or her duties. There was substantial evidence that using the dog to assist in apprehending defendant did not constitute excessive or unreasonable force. (See *Watkins v. City of Oakland, Cal.* (9th Cir. 1998) 145 F.3d 1087, 1092 [use of police dog to "bite and hold" suspect did not violate clearly established law].) Defendant does not contend otherwise.

We therefore conclude that there was sufficient evidence that defendant struck the police dog.

IV

FAILURE TO INSTRUCT ON THE "LACK OF LEGAL JUSTIFICATION" ELEMENT OF STRIKING A POLICE DOG

Defendant contends that the jury instruction on striking a police dog erroneously omitted the requirement that defendant must have acted without legal justification.

There is no current pattern jury instruction for this crime. The trial court drafted and gave its own special instruction, as follows:

"The defendant is charged in Count VI with violating Penal Code section 600(a). To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant willfully and maliciously struck, beat or kicked a police dog; and

"2. The dog was being used by a police officer in the discharge or attempted discharge of his duties."

As mentioned in part III, *ante*, Penal Code section 600, subdivision (a) applies only if the defendant acted "with no legal justification." As defendant argues, the instruction quoted above omits this element. Defendant also argues that he was using self-defense against the dog and therefore that he acted with legal justification.

The jury, however, was instructed on this point, albeit in a separate instruction. CALCRIM No. 2670 stated:

"The People have the burden of proving beyond a reasonable doubt that Sergeant McCarthy and Officers Wilson, Taylor, Ortiz, and Park were lawfully performing their duties as peace officers. If the People have not met this burden, you must find the defendant not guilty of Counts I, II, III and . . . *Count VI* and Count IX. *I say Count VI because that's the police dog case. The police dog was being controlled and used by a peace officer.*

"A peace officer is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force when making or attempting to make an otherwise unlawful [*sic*][1] arrest or detention. [¶] . . . [¶]

" . . . A peace officer may use reasonable force to arrest or detain someone to prevent escape, to overcome resistance, or [in] self-defense.

"If a person knows, or reasonably should know, that a peace officer is arresting or detaining him or her, a person must not use force . . . to resist an officer's use of that reasonable force. [¶] . . . [¶]

"If a peace officer uses unreasonable or excessive force . . . while arresting or attempting to arrest, or detaining or attempting to detain a person, that person may lawfully use reasonable force to defend himself or herself.

"A person being arrested uses reasonable force when he or she:

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[1] The trial court misread the instruction; this word should have been "lawful." Defendant does not contend, however, that the misreading was prejudicial error. "[T]he misreading of a jury instruction does not warrant reversal if the jury received the correct written instructions. [Citation.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 255.)

"(1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself form the officer's use of unreasonable or excessive force; and[]

"(2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection." (Italics added.)

This was more than adequate to inform the jury that the prosecution had the burden of proving that defendant was not acting in self-defense.

V

DISPOSITION

The judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.